IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

WILLIAM DRYLIE, JR.,	:	
	:	C.A. NO. 07-03-133
Defendant below,	:	
Appellant,	:	
	:	
vs.	:	
	:	
MICHAEL SHAHAN, Director of	:	
DIVISION OF MOTOR VEHICLES,	:	
DEPARTMENT OF TRANSPORTATION,	:	
	:	
Plaintiff below,	:	
Appellee.	:	
	:	

Submitted: March 17, 2009

Decided: March 17, 2009

On appeal from Division of Motor Vehicles

Reversed.

Eric G. Mooney, Esquire, 11 South Race Street, Georgetown, Delaware 19947, Attorney for Appellant.

Frederick Schranck, Esquire, Department of Transportation, Post Office Box 778, Dover, Delaware 19903-0778, Attorney for Appellee.

Trader, J.

In this civil appeal from the Division of Motor Vehicles Department of Public Safety, I reverse the decision of the hearing officer because the Division has failed to establish by a preponderance of the evidence that the defendant was driving a motor vehicle under the influence of alcohol.

The relevant facts are as follows: On July 13, 2006 at approximately 1:45 A.M. while Corporal Wharton of the Delaware State Police was on the shoulder of U.S. Route 13, he observed a vehicle heading northbound on that road operating without headlights. Cpl. Wharton got into his patrol vehicle and traveled northbound on U.S. 13 to catch up to that vehicle. He observed the vehicle skid off the roadway into a grassy area.

When he made contact with the defendant, he observed that the defendant had an odor of alcoholic beverage on his breath, his eyes were bloodshot and glassy, and he was staring with a confused look. Cpl. Wharton testified at the administrative hearing that he asked the defendant where he was coming from and the defendant stated that he was coming from the Castaway Lounge and that he had drunk one beer.

Cpl. Wharton then administered certain field coordination tests. Cpl. Wharton first administered the alphabet test and the defendant completed such test correctly. On the counting test, the defendant was instructed to recite numbers from 68 to 53. He recited numbers from 68 to 64 and then started over and then recited numbers from 68 to 57 and stopped. It was the officer's opinion that this test was a failure.

The defendant then exited the vehicle and used the door for support. Once he exited the vehicle, he did not have a problem keeping his balance and did not stagger or stumble.

Cpl. Wharton next instructed the defendant to perform the heel-to-toe test. On that test, the defendant did not have any problems keeping his balance and did not stagger or stumble. The defendant missed heel-to-toe between steps four and five when he took the first nine steps and he did the same thing when walking back to the police officer. The defendant completed the heel-to-toe test without stepping off the line, swaying, or raising his hands.

On the one-leg stand test, the defendant swayed on number 7 and 15, raised his arms on 23, and put his foot down on number 14. On the finger-to-nose test, the defendant touched the side of his nose with one finger of his left hand and on the next try he touched his nose with his eyes open contrary to the instructions. At the conclusion of all the tests, the defendant was arrested for driving under the influence of alcohol.

After the administrative hearing, the hearing officer found there to be sufficient evidence to establish that there was probable cause to arrest the defendant for driving under the influence of alcohol and that the Division has established by a preponderance of the evidence that the defendant was driving a motor vehicle under the influence of intoxicating liquor.

The defendant concedes that there was probable cause for the police officer to arrest him for driving under the influence, but he contends that the evidence does not establish by a preponderance of the evidence that he was driving under the influence of alcohol. I agree.

The findings of the hearing officer with reference to this issue are as follows: with respect to 21 *Del. C.* §2742, I find by a preponderance of the evidence that the defendant was in violation of Sec. 4177 . . . based on the following evidence. The one-

leg stand test was given and failed. The walk and turn test was given and failed. The defendant's blood alcohol was not entered into the hearing record; however, the defendant admitted to have been consuming beer at the Castaways Bar prior to driving. He had balance problems when exiting the vehicle, with the one-leg stand test, the walk and turn test and did not follow instructions on several of the field tests. Based on the totality of the circumstances, it is a hearing officer's opinion that a preponderance of the evidence has been shown and the license was to be revoked for three months.

Although the hearing officer based her decision on the totality of the circumstances, she did not specifically cite the defendant's driving, the finger-to-nose test, and the counting test as a basis for her decision. The hearing officer's decision primarily rests on the one-leg stand test and the walk and turn test, as well as the defendant's balance problems. The hearing officer also cites the defendant's admission that he consumed beer at Castaways as well as his failure to follow instructions on some of the tests.

With respect to consuming alcoholic beverages, the defendant admitted that he had one beer. He followed the instructions on the alphabet test and the walk and turn test, but failed to follow instructions on the finger-to-nose test, counting test, and one-leg stand test.

I now turn to the two tests that the hearing officer cites to support her finding that the defendant was driving under the influence of alcohol. As to the one-leg stand test, the hearing officer found that the defendant swayed on counts 7, 8, 9, 10, 11, 12, 13, and 14. The evidence, however, establishes that he swayed on counts 7 and 15. Thus, the hearing officer made her evaluation of the defendant's performance based in part on completely

erroneous information. It is unclear as to the extent that such erroneous information influenced her finding. I, therefore, cannot have any confidence in this finding and I cannot consider this test as a basis for the hearing officer's finding that the defendant was driving under the influence of alcohol.

As to the walk and turn test, the hearing officer found that the defendant lost his balance while performing that test. Again this finding is based in part on erroneous information. The defendant completed the first and second set of nine steps without stopping, stepping off the line, or raising his arms and completed the turn as instructed. Cpl. Wharton did not express an opinion that the defendant failed this test. The defendant missed heel-to-toe between steps four and five on the first nine steps and missed between steps four and five heel-to-toe on the second nine steps. It would appear that the defendant substantially performed this test, but more importantly, the hearing officer's finding is based on the fact that the defendant lost his balance during the test and there is no evidence to support that finding. I, therefore, reject the finding that the defendant failed the walk and turn test.

Furthermore, it is essential that the hearing officer's decision reflect the findings of fact and conclusions in a way that demonstrates that all the evidence was considered and weighed with the State's burden in mind. *Beauchamp v. Voshell*, 1991 WL 138408, at *1 (Del. Super 1991). The hearing officer failed to consider that the defendant had drunk only one beer, his speech was not slurred or mumbled, and that his balance throughout most of the contact with Cpl Wharton was good. Some of the evidence was consistent with intoxication and some of it was inconsistent. If the evidence is equally supportive of either conclusion, the Division has failed to meet its burden of the

preponderance of the evidence. A preponderance of the evidence exists when the body of evidence supporting a conclusion was greater than the body of evidence that does not support the conclusion. *Reynolds v. Reynolds*, 237 A.2d 708, 711 (Del. Super. Ct. 1967).

In this case, I conclude that the evidence is evenly balanced and therefore, the Division has failed to establish by a preponderance of the evidence that the defendant was driving under the influence of alcohol.

The state requests a limited remand for clarification of the hearing officer's findings. Based on the above conclusions of law, I decline to remand the case for further clarification.

Accordingly, the decision of the Division revoking defendant's driver's license for three months is reversed.

IT IS SO ORDERED.

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Merrill C. Trader
Judge